UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

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GENERAL CABLE TEXAS OPERATIONS LIMITED PARTNERSHIP

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and

CASES 16-CA-23012 16-CA-23279

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW

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Michael Rank, Esq., for the General Counsel.

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for the Respondent.

Mr. Wendell Helms and Mr. Dennis Keys,

25 *Mr. Wendell Helms and Mr. Dennis Key* of Dallas, TX, for the Charging Party.

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BENCH DECISION AND CERTIFICATION

Statement of the Case

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KELTNER W. LOCKE, Administrative Law Judge: I heard this case on April 28 and 29, 2004 in Marshall, Texas. After the parties rested, I heard oral argument, and on April 30, 2004, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹

The Conclusions of Law, Remedy, Order and Notice are set forth below, following further analysis of certain issues presented in this case.

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The bench decision appears in uncorrected form at pages 474 through 495 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

Further Discussion

As discussed in the bench decision, Respondent had a well–established practice of granting a wage increase each July, but failed to do so in July 2003. The Complaint alleges that this failure constituted discrimination in violation of Section 8(a)(3) of the Act, and a unilateral change in violation of Section 8(a)(5) of the Act. In the bench decision, I found that Respondent violated both sections.

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The bench decision observed that "the parties devoted considerable time to the issue of whether or not Respondent's layoff scheme was consistent with Respondent's past practice or departed from it. That issue misses the point." This statement requires clarification. A unilateral change violation concerns an employer's departure from the status quo without first notifying and bargaining with the union representing affected employees, and clearly, the status quo includes established past practices.

In this case, Respondent's "Policy Guide" provided evidence concerning what layoff procedure constituted the status quo. This "Policy Guide" includes a section captioned "Reduction in Force Policy," divided into these subsections: "Reduction in Force – Temporary," "Reduction In Force – Voluntary" "Reduction in Force – Involuntary," and "Bumping Procedures." All the "reduction in force" subsections specifically applied to layoffs exceeding, or expected to exceed, 30 days.

At hearing, Respondent's former human resources manager, Victoria Jackson, pointed to statements in the "Policy Guide" that a temporary layoff can be made for a period of up to thirty (30) days without resorting to the reduction—in—force policy." She also testified that, to her knowledge, the "Reduction in Force – Temporary" policy had never been involved.

Jackson appeared to take the position, or at least to imply, that management had complete freedom to fashion a layoff lasting less than 30 days because the "Policy Guide" said that such layoffs "can be made. . .without resorting to the reduction—in—force policy." However, the "Policy Guide" and the National Labor Relations Act are two separate things. A layoff allowed by the "Policy Guide" might still violate the duty to bargain collectively set forth in the Act.

In oral argument, Respondent did not rest its defense on the proposition that its "Policy Guide" gave it discretion to adopt a new procedure when the contemplated layoff would last 30 days. Rather, Respondent's counsel appeared to assume that its "Policy Guide" did apply to the layoff, and that Respondent followed this manual as much as the unique circumstances allowed. Thus, during oral argument Respondent's counsel stated: "It is our position that Ms. Jackson captured the actual situation better than anyone when she said, We followed the essence of the policy."

Contrary to Respondent, I conclude that the "Policy Guide" did not provide instructions on how to conduct a layoff lasting less than 30 days. Moreover, I conclude that Respondent had no established past practice concerning such a layoff. However, even if the layoff procedures in the "Policy Guide" did apply, and even if they reflected an established past practice, Respondent departed from those procedures.

Indeed, in oral argument Respondent conceded "it is undisputed we did not strictly follow that policy of volunteers." Plant Manager Kitchen testified that if management had asked for volunteers, it could have left Respondent with too few trained associates to fill needed positions. Respondent apparently assumes that there was, in fact, a past practice but that it was impractical to follow.

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Arguments about the existence or nonexistence of a past practice miss the point because *even if there were* a past practice, Respondent admittedly departed from it by failing to solicit volunteers for the layoff. Either way, Respondent breached its duty to notify and bargain with the Union. (As stated above, however, I do find that no past practice applied to temporary layoffs lasting less than 30 days.)

Respondent asserts that it had to implement the layoff quickly, but it is unclear whether the need for speed arose from sudden, unforeseeable conditions or from a lack of foresight. Respondent bears the burden of proving that exigent circumstance excuse a bargaining obligation and it has not carried that burden in this case.

In oral argument, Respondent cited *Louisiana Dock Co.*, 293 NLRB 233 (1989) for the proposition that

[W]here an Employer consistently follows past practice, has a de minimis impact on a bargaining unit and does not refuse to discuss the lay–off, it should not be found to have violated the Act. In this case, we did minimize the impact of the lay–off to the greatest extent possible.

In this case, however, Respondent did not follow past practice and the record does not establish that the layoff had a de minimis impact on the bargaining unit. Moreover, the facts in *Louisiana Dock Co.* are distinguishable. In that case, the union refused to bargain with the employer because of a dispute about the scope of the unit. The Board found that the union "cannot be heard to protest the Respondent's unilateral actions, inasmuch as it was the Union's own acts which foreclosed effective negotiations." 293 NLRB at 235.

In the present case, the Union did not refuse to bargain. Rather, Respondent presented the Union with a *fait accompli*.

Respondent clearly had a duty to notify and bargain with the Union concerning what layoff practices should be adopted and how the layoff should be carried out. *Tim Foley Plumbing Service*, 332 NLRB 1432, fn. 1 (2000), citing *Garrett Flexible Products*, 276 NLRB 704, 706 fn. 4 (1985). A layoff constitutes a material, substantial and significant change in the most basic of working conditions, and it is clearly a mandatory subject of bargaining. I recommend that the Board find that Respondent's failure to notify and bargain with the Union about the layoff and its effects violated Section 8(a)(5) of the Act.

Four other issues may warrant further discussion: (1) Whether Respondent met its rebuttal burden under *Wright Line*, 251 NLRB 1083 (1980), (2) whether the Union waived its right to be notified of and bargain about the decision to withhold the wage increase, (3) whether

Respondent lawfully decided not to grant the July raises because of its assertedly poor financial condition, and (4) whether Section 10(b) of the Act constitutes a bar.

Wright Line Issue

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In the bench decision, after determining that the General Counsel had proven the initial four *Wright Line* elements. I further concluded that Respondent had not met its rebuttal burden of showing that it would have taken the same action – withholding a periodic wage increase – even in the absence of union activity.

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The Board often applies *Wright Line* in analyzing an allegation that an employer unlawfully discharged an employee. In such instances, the Board does not look to whether the action might be justified under some arguably appropriate standard. Instead, the Board considers whether the employer's action is consistent with the way it had acted under similar circumstances in the past. As the Board stated in *Lampi LLC*, 327 NLRB 222 (1998):

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To establish an affirmative defense under *Wright Line* to a discriminatory discharge allegation, an employer must do more than show that it had reasons that *could* warrant discharging the employee in question. It must show by a preponderance of the evidence that it *would* have done so even if the employee had not engaged in protected activities.

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327 NLRB at 222–223 (italics in original).

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To establish that it would have acted in a particular way (and not just that it might have), an employer must go beyond generalities. As the Board continued in *Lampi LLC*:

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In assessing whether the Respondent has established this defense regarding [the alleged discriminatee's] discharge, we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

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327 NLRB at 223.

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Although *Lampi LLC* concerned a discharge, a similar principle applies when using the *Wright Line* framework to evaluate other adverse employment actions. Respondent must establish by a preponderance of the evidence that it would not have granted a July 2003 wage increase in any event, and the most persuasive evidence would focus on other instances in which it had a history of giving annual wage increases but decided, for economic reasons, to forego such an increase in a particular year.

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The vice president of labor relations for Respondent's parent company did not testify. That official, Robert Schlosberg, was in Canada on other business at the time of the hearing, and I do not draw any adverse inference from his absence from the witness stand. During the hearing, counsel entered into a lengthy stipulation concerning the testimony that Schlosberg would have given if he had been present. That stipulation included the following:

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Mr. Schlosberg would testify that wage increases at General Cable facilities are not guaranteed but are made with consideration to the plant's financial status and to general industry conditions, among other things. That being said, Mr. Schlosberg would acknowledge that in the past, across—the—board wage increases were given to bargaining unit employees at the Marshall facility generally in or around July of each year.

That being said, in 2003 the wire and cable industry in general and the Marshall facility in particular were in a distressed economic state. The company's financial difficulties were reflected in memoranda dated from June of 2002 and January 2003 from the parent company's CEO Gregory B. Kenny, which among other things indicated that compensation of salaried associates would be frozen and that matches of salaried employees' 401(k) contributions would not be made.

Mr. Schlosberg, consistent with the financial state of General Cable at the time (the time being the 2002–2003 time frame) effectively recommended where possible lump sum pay increases in lieu of across—the—board wage increases at unionized facilities and at non—union facilities.

Mr. Schlosberg was the lead negotiator in collective—bargaining negotiations between the Charging Party and Respondent. Since the certification of the Charging Party, which is reflected in the consolidated complaint, the parties have met and conducted collective—bargaining negotiations on more than 30 days.

At the beginning of those negotiations in April 2003, the parties agreed to negotiate non-economic terms first. This agreement was confirmed in a letter from Charging Party's lead negotiator, Dennis Keys, to plant manager Jeffrey Kitchen, dated June 19, 2003. It was later reconfirmed in a posting made by Charging Party to bargaining unit employees on or about September 28, 2003. Both parties – the Charging Party and Respondent – acted consistently with this agreement and neither Charging Party nor Respondent ever made any proposal for wage increases for bargaining unit employees.

During these negotiations for an initial collective—bargaining agreement, any time a party raised an economic matter, the parties agreed to defer it, pursuant to their agreement, until the non–economic issues had been resolved. At no time did the parties discuss wage proposals.

At no point in 2003 did the Company implement a wage increase.

Based on this stipulation, I find that in 2003, Respondent did not make contributions to the 401(k) plans of salaried employees and also did not increase their salaries. It is less clear what conclusion should be drawn from the stipulation that Schlosberg "effectively recommended where possible lump sum pay increases in lieu of across—the—board wage increases at unionized facilities and at non—union facilities."

The words "effectively recommended" indicate that Respondent followed Schlosberg's recommendation and decided not to grant annual wage increases to hourly employees in 2003. However, in the absence of documentation or testimony regarding what actually happened at Respondent's other plants, I am reluctant to conclude that Respondent simply didn't give an hourly increase to any of its employees in 2003.

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The stipulation included, without elaboration, the words "where possible." Those words suggest that Respondent may have found it impossible to deny a 2003 wage increase to certain of its employees at some location. Perhaps a union represented these employees and declined to agree to a wage freeze, but it would be imprudent to rely on such speculation rather than specific evidence.

In sum, the stipulation leaves open the possibility that Respondent did not treat all of its hourly employees the same way in 2003. Therefore, by itself, the stipulation falls short of establishing that Respondent *would* have denied, and not merely *could* have denied, a 2003 wage increase to its Scottsdale, Texas employees.

However, the stipulation should not be viewed in isolation but in conjunction with other evidence about Respondent's financial condition in the summer of 2003 and the effects of those problems on its decisions to grant or withhold wage increases. In oral argument, Respondent cited the testimony of Plant Manager Kitchen that "he was \$2.2 million behind budget, who was facing a \$2.3-million increase in supplier costs and who was looking at over a \$1-million variance in sales." In view of these conditions, Respondent's counsel asserted, "there was only one sane business decision to make, and that is: No increase, unhappily."

In effect, Respondent is raising a sanity defense: Because it was sane, it had to withhold any wage increase. This argument certainly does carry some force.

The Board, however, does not look to whether an allegedly discriminatory act was, in its opinion, sane or even prudent. For example, when the alleged discrimination involves a termination, the Board does not rely on its own views of what conduct should merit discharge. Rather, it looks to the respondent's documentation and to how the respondent acted in similar situations. *Lampi LLC*, above. The same principle applies when the alleged discrimination involves failure to grant an established, periodic wage increase. The test does not concern whether Respondent acted rationally but whether it acted consistently.

By proving that it has acted in such a consistent manner, a respondent demonstrates that it would have, and not merely could have (or should have), taken the same action even in the absence of protected activity. In the present case, I conclude that Respondent's evidence fails to carry this burden. Therefore, I further conclude that Respondent has not rebutted the General Counsel's case.

Finally, it may be noted that this *Wright Line* analysis only pertains to the allegation that by withholding the wage increase, Respondent discriminated in violation of Section 8(a)(3). Even had I concluded that Respondent's rebuttal defense prevailed, it would not affect my conclusion that withholding the wage increase without notifying and bargaining with the Union violated Section 8(a)(5). See *Bryant & Stratton Business Institute*, 321 NLRB 1007, fn. 4 (1996)("In light of our finding that the wage freeze violated Section 8(a)(5), we find it unnecessary to pass on the judge's alternative finding that the wage freeze also violated Section 8(a)(3) as that finding would not materially affect the remedy.")

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Did Respondent Depart from Past Practice?

As discussed in the bench decision, the record convincingly demonstrates that Respondent had a well–established practice of granting a wage increase each July. (Indeed, at one point during oral argument, Respondent's counsel referred to these annual raises as a "distinct recurring event.") The clearly regular and predictable nature of the July wage increases distinguishes this case from *American Mirror*, 269 NLRB 1091 (1984), cited by Respondent. See *Daily News of Los Angeles*, 315 NLRB 1236, 1240–1241 (1994).

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Additionally, Respondent stipulated that "at no point in 2003" did it grant the employees a wage increase. Nonetheless, Respondent asserts that its action was in keeping with the past practice. This argument rests on how the past practice is defined.

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According to Respondent, the past practice actually consisted of a two-step process. First, management reviewed Respondent's financial condition and decided, based on this information, how large a raise would be justified. Second, Respondent adjusted the employees' pay rates accordingly.

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Respondent contends that its financial condition was poor in 2003 and warranted management's decision not to give a raise. This outcome only signifies that economic circumstances had changed, Respondent argues, not that management failed to follow the established procedure.

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The record provides some support for Respondent's position that the past practice consisted of two steps. As discussed in the bench decision, Respondent's employee handbook stated "The goal is to give annual increases provided there are favorable business conditions and plant performance. . ." (Emphasis added)

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However, when asked if he considered giving the July 2003 wage increase, Plant Manager Kitchen answered "no." Even accepting Respondent's argument that the past practice consisted of two steps, I find that in 2003, Respondent did not take either step.

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Moreover, Kitchen identified the "foremost" reason for not granting a wage increase as "the agreement that we would not negotiate economics." (This "agreement" and its effect will be discussed below under the "Waiver" heading.) Although Kitchen went on to mention Respondent's financial condition, he did not cite this problem as the main reason for granting no wage increase.

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To the contrary, I find that Respondent's reliance on the supposed "agreement" with the Union is the "but for" factor. Because of this "agreement," management didn't even begin the process of deciding what sort of raise would be appropriate under the existing economic conditions. However, as discussed more fully below, this "agreement" did not relieve Respondent of the obligation to notify and bargain with the Union before discontinuing the annual wage increase.

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In extreme cases, a Respondent's financial plight can create an exception to the principle that an employer may not change terms and conditions of employment which are mandatory subjects of bargaining without first notifying and bargaining with the employees' exclusive representative. However, the Board recognizes as such "compelling economic conditions" only "extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action." *Mackie Automotive Systems*, above, 336 NLRB at 349, citing *Maple Grove Health Care Center*, 330 NLRB 775, 776 (2000); *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

The record does not establish such a dire situation in this case. Therefore, I conclude that Respondent's withholding of the July 2003 pay increase violated Section 8(a)(5) and (1) of the Act.

Respondent's Waiver Argument

Respondent asserts that its decision to withhold the July 2003 wage increase did not violate Section 8(a)(5) because the Union had waived its right to bargain about the issue. More specifically, Respondent asserts that during negotiations for an initial collective-bargaining agreement, the parties agreed to bargain about noneconomic terms first before reaching the presumably more difficult economic issues. Respondent contends that by entering into this agreement, the Union waived its right to bargain about the annual July wage increase which Respondent did not give in 2003.

In general, an employer may not withhold such an established wage increase without first notifying and bargaining with the employees' exclusive bargaining representative. An even more stringent rule applies when the employer and union are negotiating a contract. As the Board stated in *Stone Container Corp.*, 313 NLRB 336 (1993):

[W]hen parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilaterally discontinuing an established practice extends beyond the mere duty to give notice and an opportunity to bargain; rather, except for certain circumstances not present here, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.

313 NLRB at 336, citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). The two exceptions to this principle arise if (1) economic exigencies compel prompt action, or (2) in response to an employer's diligent and earnest efforts to engage in bargaining, the union insists on continually avoiding or delaying bargaining. See *Register–Guard*, 339 NLRB No. 47, slip op. at 2 (June 20, 2003); *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001). Respondent's waiver argument does not invoke either exception.

Respondent bears the burden of proving that the Union waived its right to bargain, and this burden is significant. The Board will not lightly infer waivers of statutory rights. In *Rockwell International Corp.*, 260 NLRB 1346, 1347 fn.6, the Board stated:

Where, as here, an employer relies on a purported waiver to establish it freedom unilaterally to change terms and conditions of employment not contained in the contract, the matter at issue must have been fully discussed and consciously explored

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during negotiations and the union must have consciously yielded or clearly and unmistakenly waived its interest in the matter.

See also *Gannett Co.*, 333 NLRB 355 (2001).

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This prerequisite to a waiver – that the union and employer had fully discussed and consciously explored the subject – serves an important purpose. It assures that the union knew it was waiving the right and intended to do so.

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Respondent does not claim that it notified the Union in advance that it planned to withhold the July 2003 wage increases and the record would not support such a contention. Indeed, Plant Manager Kitchen admitted that Respondent did *not* notify the Union of its intention not to grant the raise.

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Rather, the Respondent bases its waiver argument on an agreement which does not even mention the annual raises. This understanding concerned the procedure the negotiators would follow during bargaining: They would reach agreement on noneconomic terms before tackling the presumably more difficult economic issues.

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Before the Union could waive its right to bargain about Respondent's plan to withhold the annual July wage increases, its negotiators and the Respondent's representatives must have fully discussed and consciously explored this specific issue. A discussion about a different matter, the procedure to be followed while negotiating a contract, does not suffice.

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When representatives of Respondent and the Union were talking about how to make the bargaining process more efficient - by focusing on the presumably easier issues first -Respondent's negotiators easily could have said, "You know, if you agree to this procedure it will mean that we won't be giving raises in July." Such candor would have set the stage for full discussion and conscious exploration. But Respondent didn't do that.

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The principle of bargaining in good faith does not contemplate that one side will set snares and pitfalls for the other. To the contrary, it assumes that negotiators will say what they mean. To adopt Respondent's waiver argument would require me to find that the Union agreed to something Respondent never said. It would turn the serious, important process of collective bargaining into a game of "Gotcha."

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To carry its burden of proving that the Union waived its right to bargain about the annual July wage increase, Respondent must establish that it had fully discussed and consciously explored this issue with the Union. The record does not reflect such a discussion and I conclude that it did not take place. Therefore, I reject Respondent's claim of waiver.

Section 10(b) Defense

Section 10(b) of the Act provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . ."

29 U.S.C. § 160(b). Respondent has invoked this provision in defending against the allegations that it unlawfully withheld a wage increase in July 2003.

In oral argument, Respondent's counsel stated, in part, "This wage increase was due July 1. They [the Union] didn't file a charge until December 8." This argument's biggest enemy is arithmetic. Only five months and one week elapse between July 1 and December 8.

The General Counsel submitted a memorandum which summarized the facts as follows:

The Charge filed on 12/8/03 alleged that since about July 1, 2003 Respondent violated Section 8(a)(5) by unilaterally abandoning it[s] practice of granting annual wage increases. The Amended charge alleging this same conduct violated Section 8(a)(3) was filed on 1/21/2004. Thus, the six-month period on the first charge runs from June 7, 2003 to December 8, 2003. The six-month period on the amended charge runs from July 20, 2003 to January 21, 2004.

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The General Counsel's calculation may be off by one day with respect to the initial charge. Six months before December 8, 2003 would be June 8, 2003, rather than June 7, 2003, but in this instance, the difference of one day does not affect the outcome. Because the wage increase would have taken place on July 1, 2003, and because Respondent made no earlier announcement that it would not be granting this annual raise, it is clear that the "triggering date" was less than six months before the December 8, 2003 filing of the Section 8(a)(5) charge. Therefore, the statute of limitations does not bar the 8(a)(5) allegations.

On the other hand, the Union did not charge an 8(a)(3) violation until January 21, 2004, presumably more than 6 months after Respondent denied the July 2003 annual wage increase. If applying the statute of limitations simply meant counting back 6 months on the calendar, the 8(a)(3) allegations would be barred. However, applying Section 10(b) is more complicated than that.

The 8(a)(3) allegations would not be barred if they fall within the Board's "closely related" doctrine. In *Redd–I, Inc.*, 290 NLRB 1115 (1988), the Board held that in determining whether complaint allegations are closely related to a timely unfair labor practice charge (and therefore not time barred). it would examine whether the complaint allegations involve the same legal theory as the allegations in the charge, whether the complaint allegations arise from the same factual situation or sequence of events as the allegations in the charge, and whether a respondent would raise the same or similar defenses to the complaint allegations as it would have raised to the allegations in the charge. See also *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989); *EPI Construction*, 336 NLRB 234 (September 28, 2001); *Visiting Nurse Services of Western Massachusetts, Inc.*, 325 NLRB 1125 (July 20, 1998).

Even though the 8(a)(3) and 8(a)(5) legal theories are somewhat different, Respondent would present similar, albeit not identical, defenses to the two allegations. Moreover, the Board generally applies the "closely related" doctrine to acts that are part of the same course of conduct. See *Ross Stores, Inc.*. 329 NLRB 573–774 (1999), citing *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970). Here, the 8(a)(3) and 8(a)(5) allegations arise out of the very same act, namely, the withholding of the wage increase. Therefore, I conclude

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that the Section 8(a)(3) allegations are closely related to the timely Section 8(a)(5) allegations and are not barred by Section 10(b) of the Act.

Additionally, as the General Counsel's brief also points out, another factor must be considered in determining when the 6-month period begins to run. When the allegation concerns a unilateral change in a mandatory subject of collective bargaining, the 10(b) period does not begin to run until the union has clear and unequivocal notice of the change. *CAB Associates*, 340 NLRB No. 171, slip op. at 2 (December 31, 2003). See also *Register-Guard*, above, 339 NLRB No. 47, slip op. at 4, citing *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). Clear and unequivocal *constructive* notice will suffice. *Concourse Nursing Home*, 328 NLRB 692, 694 (1999).

Respondent, having raised the 10(b) defense, bears the burden of proving that the Union had such clear and unequivocal notice. See *Dynatron/Bondo Corp.*, 324 NLRB 572, 573 (1997), citing *Chinese American Planning Council*, 307 NLRB 410 (1992). However, Respondent does not contend that it notified the Union of its intention before making the change, and the record would not support such a claim. Therefore, if the Union received such notice, it came from some other source. In oral argument, Respondent's counsel suggested a way in which the Union might have received the necessary notice:

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We think they [the Union] had notice that it [the wage increase] wasn't going to occur. We think they had notice. Based on the testimony of the bargaining unit employee of his conversations with two supervisors, which were clearly non-coercive, by the way, Your Honor, we think the Union had actual notice prior to July 1, because this individual said that he told Mr. Ragster in June about that.

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In other words, Respondent argues that a supervisor told a bargaining unit employee that the company would not be giving a raise and this employee conveyed the information to Jerry Ragster, who is temporary chairman of the Union's bargaining committee. Further, Respondent contends that the bargaining unit employee provided this information to Ragster some time before July 1, 2003.

As discussed above, June 8, 2003, not July 1, 2003, is six months before the filing of the initial charge. Therefore, to bar litigation of the 8(a)(5) allegation, Respondent must show that at some time before June 8, 2003, the Union had clear and unequivocal knowledge of Respondent's decision to withhold the July 2003 wage increase.

Respondent identified the bargaining unit employee as Allen Parker, who testified that during an employee safety meeting in June 2003 he asked Johnny Cole, "Are we going to get our usual raise in July?" For reasons discussed in the bench decision, I have credited Parker's testimony that Cole answered "no, we were not, and as long as the company was in negotiations with the union, the company could not change anything."

The record establishes that Cole is a supervisor within the meaning of Section 2(11) of the Act. Therefore, his statement to Parker is attributable to Respondent.

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Parker further testified that a few days later, he posed the same question to John Ritter, whom Parker identified as "another supervisor." According to Parker, Ritter replied that the employees would not be getting a raise "because the company is in negotiations, and they could not change anything while we're in negotiations." Although I credit Parker's testimony, I do not attribute Ritter's statement to Respondent because the record does not establish Ritter's supervisory status.

In any event, through his conversation with Cole, Parker received notice in June 2003 that Respondent would not be raising wages in July. However, Parker is not a Union official, and information given to him does not constitute notice to the Union.

Respondent seeks to overcome this problem with evidence that Parker conveyed the information to Jerry Ragster. Because Ragster was chairman of the Union's bargaining committee, notice to him presumably would constitute notice to the Union.

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Both Parker and Ragster confirm that Parker passed along the "no raise" information to Ragster, but the record does not establish when they discussed the matter. Ragster's testimony does indicate that he and Parker had this conversation some time in June 2003:

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- And you were here yesterday and you heard Mr. Parker testify that he went and told you that he had heard from two supervisors that he wasn't going to get a raise. Correct?
- A Yes
- Q Was Mr. Parker's testimony on that accurate?
- A Yes.
 - Q So as of June, you were pretty much aware on your own behalf and for Mr. Parker, that the Company was not going to give a raise.
 - A Yes.

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With respect to the 8(a)(5) charge, to prevail on the 10(b) defense, Respondent must show that the Union had clear and unequivocal notice before June 8, 2003. Even though I credit Ragster's testimony, quoted above, it falls short of establishing that the Union had any notice at all before June 8. "As of June" just isn't specific enough to carry Respondent's burden of proof.

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It may also be noted that Ragster's testimony is too vague to satisfy the requirement that notice of the unilateral change must be clear and unequivocal. Being "pretty much aware" is not the same thing as being "aware" or "fully aware." Otherwise, the qualifying words "pretty much" would serve no purpose.

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It is true that being "pretty much aware" of the unilateral change might have triggered the Union's duty to exercise reasonable diligence by investigating the situation. Thus, it raises a possibility that at some point in June 2003, the Union had constructive notice of the unilateral change. However, because Respondent has not established a more precise date, it has failed to prove that the Union had constructive notice outside the 10(b) period.

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Respondent further contends that Ragster should have inferred that there would be no raise. In June, Respondent customarily posted a notice informing employees how much the July raise would be, but Respondent did not post such a notice in June 2003. Respondent argues that

when Ragster saw no notice, he should have been aware that management had decided not to give a raise in July.

At the outset, it may be noted that the record does not establish that Ragster would have expected Respondent to post the wage notice before June 8, 2003. Similarly, there is no reason to conclude that Ragster reasonably would have become suspicious if he did not see such a wage announcement before June 8. Respondent has failed to carry its burden of proof on this issue.

Moreover, Respondent's argument fails to take into account some unusual circumstances. On June 18, 2003, management decided that a temporary layoff was needed because the plant had produced too much low voltage cable. Respondent announced this layoff to employees on June 19, 2003 and began implementing it on June 22. Respondent characterized this layoff as temporary, and the laid off employees had good reason to expect to be recalled after the company reduced its overstock of cable.

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In these circumstances, the absence of a wage announcement on the bulletin board would not signal that Respondent had decided to withhold the annual wage increase. It would be equally reasonable for the Union to conclude that the managers had their hands full with the layoff and would prepare the wage announcement later. Considering that the absence of a wage posting could be explained plausibly in more than one way, very little reasonably could be inferred from the absence of such a notice.

Before Respondent withheld the July 2003 wage increase, nothing placed the Union on clear and unequivocal actual notice that Respondent intended to make this change. In concluding that the Union also did not have clear and unequivocal constructive notice, I follow the settled standard which the Board recently reiterated:

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"In determining whether a party was on constructive notice, the inquiry is whether that party should have become aware of a violation in the exercise of reasonable diligence." [Citing *CAB Associates*, 340 NLRB No. 171, slip op. at 2 (2003).] It is well settled that the burden of proving a 10(b) defense rests on the party asserting it. See *Nursing Center of Vineland*, 318 NLRB 337, 339 (1995).

St. George Warehouse, Inc., 341 NLRB No. 120, slip at 2 (May 12, 2004). See also Paul Mueller Co., 337 NLRB 764, 765 (2002)("The Respondent had the burden of showing that the Union knew or should have known [about the unilateral change] prior to the 10(b) period. . .")

For the reasons discussed above, I conclude that Respondent has not carried its burden of showing that the Union had either actual or constructive notice of the unilateral change before June 8, 2003. Therefore, I reject Respondent's Section 10(b) defense.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B.

Employees must be made whole for the wage increase which Respondent unlawfully denied them in July 2003. (As stated above, the remedy for the unlawfully withheld increase is the same whether applied under a Section 8(a)(3) or 8(a)(5) theory. **Bryant & Stratton Business Institute**, 321 NLRB 1007, fn. 4 (1996.)

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Although the testimony established that Respondent customarily granted an annual wage increase averaging somewhere in the 3 to 3–1/2 percent range, the amount of the wage increase varied somewhat from year to year and also occasionally varied depending upon job classification. Therefore, I recommend that the exact amounts of backpay be determined, if necessary, at the compliance stage.

Respondent unilaterally changed the procedure it had adopted for laying off employees, then selected employees for layoff and laid them off without first notifying and bargaining with the Union about the change and its effects. This violation of Section 8(a)(5) and (1) must be remedied.

Under *Lapeer Foundry & Machine*, 289 NLRB 952, 955–956 (1988), "the traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes ordering the employer to bargain over the layoff decision and the effects of that decision, reinstating the laid–off employees, and requiring the payment to the laid–off employees of full backpay, plus interest, for the duration of the layoff." *Ebenezer Rail Car Services, Inc.*, 333 NLRB 167, fn. 5 (2001).

In the present case, Respondent has recalled all the employees affected by the layoff, so a reinstatement order isn't necessary. However, I recommend that the Board order Respondent to bargain with the Union concerning the layoff and its effects, and to pay each employee affected by the layoff full backpay, with interest, for the duration of the employee's layoff.

During oral argument, Respondent alluded to a remedy similar to that in *Transmarine Corp.*, 170 NLRB 389 (1968). In the circumstances of this case, however, the remedy described in *Lapeer Foundry & Machine* is more appropriate.

The Board certified the Union as the employees' exclusive bargaining representative on March 12, 2003. Because Respondent unlawfully made unilateral changes during the Union's certification year, a question arises regarding the appropriate remedy. Should it include an extension of the certification year?

The General Counsel has not contended, and the record does not establish, that Respondent failed to recognize, meet, or bargain with the Union. Additionally, the evidence does not indicate that the unilateral changes seriously tainted or impeded the bargaining process. Therefore, I do not recommend that the certification year be extended. See *Visiting Nurse Services of Western Massachusetts, Inc.*, 325 NLRB 1125, 1132 (1998).

CONCLUSIONS OF LAW

- 1. The Respondent, General Cable Texas Operations Limited Partnership, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 - 2. The Charging Party, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America UAW, is a labor organization within the meaning of Section 2(5) of the Act.
 - 3. The Respondent violated Section 8(a)(1) of the Act by telling employees that they would not receive an annual wage increase because Respondent was negotiating with the Union, by withholding this annual wage increase in July 2003 because employees had selected the Union as their collective-bargaining representative, by withholding this wage increase without first notifying and bargaining with the Union, and by unilaterally changing its layoff criteria and using the new criteria to select employees for layoff without first notifying and bargaining with the Union,
- 4. The Respondent violated Section 8(a)(3) of the Act by withholding an annual wage increase in July 2003 because employees had selected the Union as their collective—bargaining representative.
- 5. The Respondent violated Section 8(a)(5) of the Act by making the following unilateral changes in wages, hours, and other terms and conditions of employment which are mandatory subjects of collective bargaining without first notifying and bargaining about these changes and their effects with the Union which had been certified as the employees' exclusive bargaining representative: (1) Withholding an annual wage increase in July 2003; (2) changing its procedure for selecting employees for layoff about June 18, 2003, applying the changed procedure to select employees for layoff, and then laying off those employees beginning June 22, 2003.
 - 6. The unfair labor practices described above in paragraphs 3, 4 and 5 are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 7. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found herein.
 - On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended 2

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If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, General Cable Texas Operations Limited Partnership, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- (a) Threatening employees that they would lose an annual wage increase because the Union was negotiating on their behalf for a collective—bargaining agreement.
 - (b) Discriminating against employees by denying them an annual wage increase because the Union they had selected was negotiating on their behalf for a collective–bargaining agreement, or otherwise because of their protected, concerted activities.
 - (c) Unilaterally changing its past practice of granting annual wage increases in July without first notifying and bargaining with the Union concerning such a change and its effects.
- 20 (d) Unilaterally changing its past practice of selecting employees for layoff, applying this changed procedure to select employees for layoff, and laying off these employees without first notifying and bargaining with the Union concerning such changes and their effects.
- (e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 30 (a) Make all bargaining unit employees who were employed by Respondent on July 1, 2003 whole, with interest, for all losses they suffered because Respondent withheld their July 2003 annual wage increases.
- (b) Make all bargaining unit employees whom Respondent laid off at any time between June 19 and June 26, 2003 whole, with interest, for all losses of wages and benefits they suffered because of the layoff.³
- (c) Restore all terms and conditions of employment affected by the unilateral changes described above in paragraph 5 of the Conclusions of Law to the status quo existing before the unilateral changes.

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All backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) On request, bargain in good faith with the Union concerning the mandatory subjects of bargaining affected by the unilateral changes described above in paragraph 5 of the Conclusions of Law.
(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
(f) Within 14 days after service by the Region, post at its facilities in Scottsville, Texas, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 18, 2003.
(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.
Dated Washington, D.C.

Keltner W. Locke Administrative Law Judge

If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. Except for one 8(a)(1) allegation, I find that Respondent violated Sections 8(a)(1), (3) and (5) of the Act, as alleged in the Complaint.

Procedural History

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This case began on August 18, 2003, when the Charging Party filed its initial charge against Respondent in Case 16–CA–23012. The Charging Party is the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America – UAW. For brevity, I will refer to this labor organization simply as the "Charging Party," the "Union," or the "UAW." The parties stipulated at hearing that Respondent's correct name is General Cable Texas Operations Limited Partnership. For brevity, I will refer to this employer simply as "Respondent."

On December 8, 2003, the Union filed a charge against Respondent in Case 16–CA–23279. The Union amended this charge on January 21, 2004.

On January 28, 2004, after investigation of the charges, the Regional Director for Region 16 of the National Labor Relations Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which I will call the "Complaint," and Respondent filed a timely Answer. In issuing the Complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On April 28, 2004, a hearing opened before me in Marshall, Texas. On that day and the next, the parties presented evidence. The General Counsel and Respondent also submitted briefs.

Today, April 30, 2004, counsel presented oral argument. After a recess to consider these matters, I am issuing this bench decision.

Admitted Allegations

Based on the admissions in Respondent's Answer and on the stipulations received during the hearing, I find that the government has proven the allegations raised in Complaint paragraphs 1(a), 1(b), 1(c), 2, 3, 4, 5, 8, 9, and portions of Complaint paragraph 6.

More specifically, I find that the Charging Party filed and served the charges as alleged.

Also, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and therefore is subject to the Board's jurisdiction. Further, I find that at all material times, Plant Manager Jeffrey Kitchen and Human Resources Manager Victoria Jackson were Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively. Also, I find that at all material times, Foreman Johnnie Cole

was Respondent's supervisor within the meaning of Section 2(11) of the Act and Director of Security William Anthony was Respondent's agent within the meaning of Section 2(13) of the Act.

Additionally, I find that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act and that on March 12, 2003, it was certified as the exclusive collective bargaining representative in a unit appropriate for collective—bargaining within the meaning of Section 9(b) of the Act. That unit, which I will call the "Unit," is as follows:

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INCLUDED: All full-time and regular part-time production employees, including but not limited to extrusion, bare mill and finishing operators, and maintenance employees, including lab techs, compound operator-techs, electrical testers, shipping and receiving employees, building-grounds techs, receiving/stores clerks, quality assurance tech clerks, inventory clerk, plant clerks, and janitors employed by the Employer at its Scottsville, Texas facility.

EXCLUDED: All other employees including office clerical employees, professional employees, guards and supervisors as defined in the Act.

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Although Respondent's Answer does not admit all allegations in Complaint paragraph 10, that paragraph alleges a legal conclusion supported by Respondent's admissions and not contradicted by any evidence in the record. Therefore, I conclude that at all material times, the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive representative of the Unit for the purpose of collective—bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

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Complaint paragraph 14 also alleges a legal conclusion, specifically, that the subjects described in Complaint paragraphs 11 and 12 relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining. These subjects are the layoff of employees and the criteria used to select employees for layoff, and an annual wage increase. I conclude that the General Counsel has established that these subjects are mandatory subjects for the purposes of collective bargaining. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *Tri–Tech Services, Inc.*, 340 NLRB No. 97 (September 30, 2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain. ..").

Contested Allegations

40 Complaint Paragraph 7(a)

Complaint paragraph 7(a) alleges that about March 1, 2003, Respondent, by William Anthony, at Respondent's Scottsville, Texas facility, threatened its employees with discipline, discharge, and/or other unspecified reprisals because they were wearing Union shirts. Respondent has denied this allegation.

In considering this allegation, I must resolve a conflict between the testimony of employee Larry Hill and that of Director of Security William Anthony. Hill testified that in

early March 2003, he wore a Union t-shirt. According to Hill, Director of Security Anthony stopped him while he was wearing this t-shirt, and asked, "Do you like your job?" Hill testified that he replied, "Yeah, I'm having no problems with it."

In Hill's version, Anthony then remarked that Hill was wearing a UAW shirt. When Hill agreed, Anthony then said that a General Cable shirt's colors were green and white. Hill then explained he could not vote in the election because he was hired one day after the cutoff date. Anthony said, "You might ought to think about what you wear."

Anthony's account is different. He testified that he heard some people laughing outside his office. He stepped outside to join in and learned that they were talking about shirts. Sometime during the conversation, Anthony remarked, "I prefer green t—shirts" and Hill began to talk about the UAW shirt. Anthony responded, "I can't go there" and walked back into his office.

No other witnesses testified concerning this allegation. However, according to Hill, another employee, named Washington, was present during the conversation. Anthony testified that at least two other individuals were present, although he could not recall who they were.

The government's failure to call a known witness raises the concern that this witness would not have corroborated Hill. Therefore, I credit Anthony's testimony instead of Hill's. Anthony's testimony does not establish a violation of Section 8(a)(1), so I recommend that the Board dismiss this allegation.

Complaint Paragraphs 7(b) and 7(c)

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Complaint paragraph 7(b) alleges that about August 2003, the exact date being unknown, Respondent, by Jeffrey Kitchen, at Respondent's Scottsville, Texas facility, threatened employees by telling them that they would not receive their cost–of–living wage increase because the Respondent was negotiating with the Union. Complaint paragraph 7(c) alleges that about August 2003, the exact date being unknown, Respondent, by Jeffrey Kitchen, at Respondent's Scottsville, Texas facility, threatened employees by telling them that they would normally get a three–and–one–half percent increase in July, but that was not going to happen because the Respondent was still negotiating with the Union. Respondent has denied these allegations.

Employee George Anthony Harper testified that at an employee meeting, he asked Plant Manager Kitchen whether the employees would be receiving a cost–of–living raise. According to Harper, Kitchen replied that normally the employees would receive a 3–1/2 percent raise, but this year they would not because they were in negotiations with the UAW. Based upon my observations of the witnesses, I credit Harper's testimony.

Additionally, I note that the parties have stipulated that at the beginning of negotiations, the Respondent and the Union agreed to negotiate non–economic terms first, that at no time did these parties discuss wage proposals, and that "at no point in 2003 did the Company implement a wage increase." Moreover, when the General Counsel questioned Kitchen during the hearing, Kitchen's testimony included the following:

Q In fact, General Cable didn't even think about wages in June or July of 2003 because of the agreement reflected in Joint Exhibit 2, is that right?

A Well, in terms of the increase, we first and foremost we had the agreement that we would not negotiate economics and also with consideration to, as we discussed, as was talked about earlier, financially, our plant was upside down to a budget we had built, we were, at that point in time, we were 2.6 million dollars behind our plan, our business plan.

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Thus, in his testimony, Kitchen gave two reasons for no wage increase in 2003, but he indicated the "foremost" reason was the agreement between Respondent and the Union to negotiate non–economic terms first. The statement attributed to him by Harper is consistent with this "foremost" reason.

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A June 17, 2002 memo from Human Resources Manager Vicki Jackson to all Marshall plant hourly associates announced a 3.5 percent wage increase in that year and stated "July is the traditional time for you to receive an increase." Moreover, employees credibly testified that generally, and apart from 2003, they had received July wage increases in the 3 to 3–1/2 percent range. This evidence is consistent with the statement attributed to Kitchen, that normally the employees would have received a 3–1/2 percent increase but would not get one in 2003 because Respondent was in negotiations with the UAW. For these reasons, I find that Kitchen did make this statement.

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The question remains, did the statement violate the Act? In the context of a union organizing campaign, an employer's statement that employees would not receive a scheduled wage increase because of the union clearly violates Section 8(a)(1). See **Seda Specialty Packaging Corp.**, 324 NLRB 350 (1997); **Webco Industries**, 327 NLRB 172, 173 (1998)("Although an employer is generally free to make critical comments about a union that is seeking to organize its employees, it violates Section 8(a)(1) of the Act when it takes adverse action against employees and falsely blames its action on the union.").

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In the present case, however, Kitchen did not make the statement in the context of an organizing campaign. Rather, the Union already had been certified as the exclusive bargaining representative and was negotiating with Respondent for an initial contract.

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If the Union clearly had waived its right to bargain over the annual wage increase, communicating that fact to employees would not interfere with, restrain or coerce them in the exercise of their Section 7 rights. Conceivably, a labor organization might agree to eliminate a scheduled wage increase as part of the union's overall bargaining strategy. In such a circumstance, an employer would not violate Section 8(a)(1) simply by explaining, in response to an employee's question, that "we didn't give you the wage increase because the Union agreed to forego it."

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On the other hand, if a union did not waive its right to negotiate concerning a scheduled wage increase, an employer would not be telling the truth if it explained that it gave no wage increase because of an "agreement" with the union. Instead, such an explanation would distort

the facts in a way which unfairly placed responsibility on the union and thereby interfered with the employees' exercise of protected rights.

Therefore, whether or not Kitchen's explanation violated Section 8(a)(1) turns on whether the Union had agreed to give up the annual wage increase. For reasons discussed later in this decision, I conclude that the Union did not agree to eliminate the July wage increase and did not waive its right to bargain about this matter. Accordingly, I conclude that Kitchen's statement to the employee was not correct, and violated Section 8(a)(1) of the Act.

10 Complaint Paragraph 7(d)

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Complaint paragraph 7(d) alleges that about June 2003, the exact date being unknown, Respondent, by Johnnie Cole, at Respondent's Scottsville, Texas facility, threatened employees by telling them that they would not receive their cost—of—living wage increase because the Respondent was negotiating with the Union. Respondent has denied this allegation.

Allen Parker testified that during a safety meeting, he asked Supervisor Johnny Cole if they were going to get a raise in July. Cole replied no, that as long as the company was in negotiations with the Union, the company couldn't change anything. Cole did not specifically deny the statement which Parker attributed to him.

When Respondent's counsel asked Cole whether he had had any conversation with any nonmanagement employee regarding the "nonissuance" of a July wage increase, Cole answered, "Not that I can recall." This answer does not constitute a clear denial that he made the statement attributed to him. Additionally, the question itself refers to a conversation with an employee, not to answering a question during a meeting. I conclude that Parker's testimony remains uncontradicted, and I credit it.

For the same reasons that Kitchen's explanation violates Section 8(a)(1) of the Act, so does Cole's. When employees selected the Union to represent them, they implicitly chose the collective—bargaining process as the method of dealing with their employer concerning wages. Incorrectly attributing the absence of a wage increase to this protected activity interferes with the free exercise of Section 7 rights. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1), as alleged in Complaint paragraph 7(d).

Complaint Paragraph 7(e)

The Complaint does not include a paragraph 7(e). However, at the close of oral argument, the General Counsel moved to amend the Complaint by adding a paragraph 7(e) which would state as follows: About June 2003, the exact date being unknown, Respondent, by John Ritter, at Respondent's Scottsville, Texas facility, threatened employees by telling them that they would not receive their cost–of–living wage increase because the Respondent was negotiating with the Union. Respondent did not object to this proposed amendment.

It appears that the General Counsel would support this allegation with the testimony of Allen Parker that a few days after his conversation with Supervisor Cole, he encountered Supervisor John Ritter on the plant floor, asked Ritter the same question he had asked Cole, and got the same answer.

Ritter did not testify. During the hearing, the parties stipulated that if he had been called to the witness stand, "Mr. John Ritter, a supervisor of the 600 volt section, would testify the same way that Mr. Cole testified." Although this stipulation refers to Ritter as a "supervisor," there is no specific stipulation that Ritter was Respondent's supervisor within the meaning of Section 2(11) of the Act.

Although the General Counsel argues that the allegation in the proposed Complaint paragraph 7(e) has been "fully litigated," I am not so sure. In any event, should I grant the General Counsel's motion and find a violation based upon the rather sparse record, it would add nothing to the remedy in this matter. A remedy for the violations alleged in Complaint paragraphs 7(b), 7(c) and 7(d) would also cover the new allegation. In these circumstances, I deny the General Counsel's motion to amend the Complaint.

Complaint Paragraph 11

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Complaint paragraph 11 alleges that about June 18, 2003, Respondent unilaterally changed its layoff criteria and used the new criteria to lay off approximately 46 employees. Complaint paragraph 15 alleges that Respondent took this action without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. Respondent has denied these allegations.

The record establishes without contradiction that on June 18, 2003, Respondent's management decided to lay off employees involved in producing low voltage cable. At hearing, management officials testified that the plant already had produced too much of the low voltage cable, so much, in fact, that it had to be stored in inappropriate places, and that there was an urgent need to shut down this part of its operations quickly. Therefore, Respondent asserts, management had no time to bargain with the Union before deciding upon who would be laid off and implementing the lay off.

After making this decision on June 18, 2003, Human Resources Manager Victoria Jackson and Plant Manager Jeff Kitchen used a speakerphone to try to contact the Union. According to Jackson, they first tried to reach International Representative Dennis Keys, and when they could not, contacted Jerry Ragster, an employee who is the temporary head of the Union's bargaining committee.

Kitchen told Ragster about the planned layoff, but did not offer to bargain about it. Ragster requested that Kitchen fax him a list of employees to be affected by the layoff, and Kitchen promptly did so. However, Respondent later made changes and, on June 19, 2003, posted several notices in the plant to announce which employees would be laid off.

There is some question about whether the Union had authorized Ragster to receive notifications from Respondent. However, it is clear that the Union knew about the layoff by June 19, 2003, when International Representative Keys hand delivered a letter to Respondent.

On this date, the parties were to have their first bargaining session, and Keys brought the letter to this meeting and gave it to Plant Manager Kitchen.

The letter requested certain information about the layoff and then concluded with the following:

Finally, the Union demands to bargain over the effects of the down turning business. If you have questions, please feel free to call me at (318) 668–4020.

Respondent, focusing on the word "effects," argues that the Union did not request to bargain over the layoff decision but only concerning the effects of that decision. The General Counsel disagrees. Keys did not ask to bargain about the effects of the layoff but about the effects of the business downturn. One of those effects, the General Counsel contends, is the layoff decision itself.

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In agreement with the General Counsel, I conclude that the Union requested to bargain about the decision as well as its effects. In any event, it soon became clear to Respondent that the Union wanted to bargain about the decision as well as the effects, because members of the Union's negotiating committee challenged the method which management had used to select employees for layoff.

The testimony of Human Resources Manager Jackson establishes that the parties had a heated discussion regarding the layoff. One member of the Union's negotiating team, Mr. Owens, said that in selecting who would be laid off, management had not followed the procedure set forth in its policy manual. He asked why management did not follow the policy. He also protested that it was not fair for more senior employees to be laid off while some junior employees remained at work.

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Jackson, referring to the wording of the policy, maintained that it gave management the freedom to ignore the specified procedures for any temporary layoff lasting less than 30 days. According to Jackson, the Union committee member "interrupted a lot and didn't understand what we were saying." According to Jackson, after 20 minutes the parties "agreed to disagree."

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Jackson testified that the subject came up again at the next bargaining session, and suggested that the Union committee member was still upset. "Again, we tried to walk him through it," Jackson recalled, "and again got the same reaction."

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Respondent asserts that the Union did not press the matter. Union officials testified that they did not pursue it further because they perceived it was a "done deal" and that Respondent had no intention of bargaining about it. Indeed, by the second bargaining session, on April 24, 2003, Respondent already had implemented much of the layoff.

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The General Counsel asserts that the Union did not have to continue to press the matter because Respondent announced the layoff as a *fait accompli*. In agreeing with the General Counsel, I rely not only on the Union witnesses' conclusion that it was a "done deal," but also on the testimony of Human Resources Manager Jackson.

Both from her words and demeanor, I formed the impression that Respondent's management had no intention of modifying its layoff scheme or even entering into negotiations about it. Management appeared to be quite proud of how it had selected employees to minimize the effect of the layoff on employees, and management negotiators may even have been disappointed that the Union committee members did not appreciate the wisdom of what they had accomplished.

Jackson said that the Union did not ask Respondent to go back and redo the layoff, adding "it was already in effect." Additionally, Jackson admitted that management made the layoff decision on June 18. Both these facts are consistent with the conclusion that the layoff was a *fait accompli*.

Based upon the record as a whole, I find that the layoff was a *fait accompli*, and that the Union did not have the duty to continue to request bargaining about it. The Union is not required to do a futile act.

During the hearing, the parties devoted considerable time to the issue of whether or not Respondent's layoff scheme was consistent with Respondent's past practice or departed from it. That issue misses the point. Clearly, a layoff is a mandatory subject of bargaining and once the Union became the exclusive bargaining representative, Respondent had a duty to notify and bargain with it in advance.

The Union became the exclusive bargaining representative on March 12, 2003. So clearly, in June 2003, Respondent had a duty to negotiate with it.

Additionally, I reject Respondent's argument that there was an emergency situation which required immediate action. The backlog had been accumulating for some time and Respondent could have notified the Union earlier of its plan to lay off employees. This kind of backlog does not present a situation so dire that an employer must act immediately without regard to the Union representing its employees.

In sum, I find that Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union over the June 2003 layoff and the procedures it adopted to select employees for the layoff.

Complaint Paragraphs 12 and 13

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Complaint paragraph 12 alleges that about July 2003, Respondent unilaterally withheld an annual wage increase from all the Unit employees and that Respondent did so because the Unit employees joined or assisted the Union and to discourage employees from engaging in these activities. Under *Wright Line*, **251** NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric*, *Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The record establishes that the Unit employees engaged in the protected activity of selecting the Union to represent them, and that Respondent knew it.

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The record convincingly shows that Respondent had an established practice of granting a wage increase of 3 to 3–1/2 percent each July, but did not do so in 2003. I conclude that the failure to grant this periodic wage increase constitutes an adverse employment action.

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The statements of Plant Manager Kitchen – that employees would not receive a wage increase because of the negotiations with the Union – establish the link between the employees' protected activity and the adverse employment. Therefore, I conclude that the General Counsel has established the initial four *Wright Line* elements and that the burden shifted to Respondent to show that it would have taken the same action even in the absence of protected activity.

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Further, I conclude that Respondent has not carried this burden. Therefore, I conclude that the government has proven the 8(a)(3) violation alleged in Complaint Paragraphs 12 and 13.

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Respondent contends that the 6-month statute of limitations inherent in Section 10(b) of the Act bars finding a Section 8(a)(3) violation. The employees would have received the wage increase some time in July 2003, but the Union did not file a charge alleging this violation until December 8, 2003, which is more than 6 months.

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I begin this analysis by noting that Section 10(b) is an affirmative defense. Respondent bears the burden of proving all elements needed to establish this defense.

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The General Counsel argues that Respondent has not established that the Charging Party received notice that Respondent was not granting the wage increase more than 6 months before the filing of the charge. The record does not establish precisely when either the employees or the Union knew, or reasonably should have known, that Respondent was not granting its annual wage increase in July 2003. Therefore, I conclude that Respondent has not carried its burden and reject the Section 10(b) defense.

Complaint Paragraphs 12 and 15

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Complaint paragraphs 12 and 15, read together, allege that Respondent withheld the annual July wage increase without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct and its effects. Respondent has denied these allegations.

Respondent argues that its established practice was to review the wages annually and to decide upon the appropriate amount of a wage increase based upon economic factors. It cites the following language from its policy handbook:

- The goal is to give annual increases provided there are favorable business conditions and plant performance. . .Employment area and industry surveys of wages and benefits may be conducted to assist in making decisions regarding potential adjustments to wages and benefits.
- In essence, Respondent asserts that management did review wages in June 2003 and decided not to give a raise because of bad economic conditions. Business conditions and plant performance, the factors listed in the policy manual, simply did not justify giving employees a raise. Therefore, Respondent contends, it did not deviate from its established practice.
- This argument depends on the assumption that Respondent conducted such a review. However, the following testimony by Plant Manager Kitchen indicates the opposite:
 - Q My question to you is this: In June, did you even consider giving the July 2003 wage increase?
 - A No

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- Q And General Cable never notified the Union of its intention regarding the July 2003 annual wage increases, correct?
- A Correct.
- Based on this admission, I find that Respondent did not conduct any review in 2003, and thereby departed from its established practice.

Waiver

- At the start of bargaining, the Union entered into an agreement that it would negotiate noneconomic terms before moving on to economic items. Did this agreement act as a waiver which privileged Respondent to withhold the July 2003 wage increase.
- As the Board stated in *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635 (2001)
 - It is...settled law that any waiver by a union of its right to bargain over mandatory subjects must be clear and explicit and that the employer has the burden of establishing an affirmative defense that a unilateral postexpiration change was consistent with past practice.

335 NLRB at 636.

I conclude that the Union did not waive its right to bargain about the annual wage increase. The Respondent has not demonstrated that the Union intended, clearly and unequivocally, to waive this right. Moreover, by its terms, an agreement to negotiate noneconomic terms first would not ordinarily be viewed as eliminating Respondent's duty to adhere to its established practice granting annual wage increases.

In sum, I find that by withholding the annual increase and by failing to bargain with the Union over this matter, Respondent violated Section 8(a)(5) and (1) of the Act.

5 Certification

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When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, the parties representatives have impressed me greatly with their courtesy and professionalism. They stand as an example to the bar, and I hope that all will follow this example. The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

- WE WILL NOT threaten to withhold an annual wage increase because employees have selected the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America UAW to represent them in collective bargaining or because we were negotiating with this Union concerning the terms of a collective—bargaining agreement.
- WE WILL NOT change the procedures for selecting bargaining unit employees for layoff without first notifying and bargaining with the Union concerning the procedures, the layoff, and its effects.
- **WE WILL NOT** change our practice of giving annual wage increases to employees without first notifying and bargaining with the Union.
 - **WE WILL NOT,** in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- WE WILL make employees whole, with interest, for all losses they suffered because we unlawfully failed to grant a wage increase in July 2003.

JD(ATL)-32-04

	AL CABLE TEXAS	OPERATIONS LIMITED I	PARTNERSHIP
<u>GENER</u>		(Respondent)	
GENERA Dated:			

WE WILL make whole, with interest, all employees whom we laid off between June 19, 2003 and June 26, 2003 without first notifying and bargaining with the Union concerning the procedure for selecting employees for layoff, the layoff and its effects.

(817)978-2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178

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THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978–2925